

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNICOMP, INC. *et al.*,

Plaintiffs

v.

HARCROS PIGMENTS, INC. *et al.*,

Defendants

Civil No. 97-55-P-C

GENE CARTER, District Judge

**MEMORANDUM AND ORDER ON THE RECOMMENDED DECISION OF THE
MAGISTRATE JUDGE**

On October 14, 1997, United States Magistrate Judge Cohen filed with the Court his Recommended Decision regarding the separate Motions to Dismiss pursuant to Fed. R. Civ. P. 12(b)(2) filed by Defendants Harcros Pigments, Inc. ("Harcros") and Walsh & Associates, Inc. ("Walsh") (Docket No. 26). The Magistrate Judge recommended that the Court deny both Defendants' Motions to Dismiss. The Recommended Decision of the Magistrate Judge, setting forth the facts and the legal framework for the exercise of personal jurisdiction, is appended to this Memorandum and Order as "Exhibit A." Harcros and Walsh each filed Objections to the Magistrate Judge's Recommended Decision (Docket Nos. 28 and 27), requesting *de novo* review of the Magistrate Judge's Recommended Decision and findings pursuant to 28 U.S.C. § 636(b)(1), and Plaintiffs UniComp, Inc. ("UniComp") and Unico, Inc. ("Unico") responded to Defendants' Objections (Docket Nos. 29 and 30).

The Court has reviewed and considered the Magistrate Judge's Recommended Decision

as well as the entire record. The Court has made a *de novo* determination of the matters adjudicated by the Magistrate Judge and concurs with the Magistrate Judge's recommendations. The Court will address the objections of the Defendants separately.

A. HARCROS'S OBJECTIONS

Harcros initially objects to the Magistrate Judge's determination that the relatedness requirement is uncontested.¹ *See* Recommended Decision at 7; Defendant Harcros's Objection to the Recommended Decision at 2 n.1. Harcros argues that its contacts are limited to "after-the-fact" contacts, and thus, they are not related to and do not give rise to Plaintiffs' claims. *See* Harcros's Reply Memorandum (Docket No. 20) at 4. In *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1333 (1997), the Court of Appeals for the First Circuit explained that the relatedness requirement is one of proximate cause, albeit applied with a flexible, relaxed approach. *Nowak*, 94 F.3d at 715. The Court's assessment of relatedness is informed by the concept of foreseeability. *Id.* The Court determines that an alleged injury from the sale of a product in a forum targeted by the manufacturer through its choice of distributors is sufficiently foreseeable to satisfy the relatedness prong of the jurisdictional inquiry. The Court further notes that neither the Supreme Court nor the Court of Appeals for the First Circuit has expressed concern about the causal link in cases analyzing the stream-of-commerce theory of personal jurisdiction. *See, e.g., Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987); *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671 (1st Cir. 1992). Rather, in these

¹ As the Recommended Decision explains, there are three requirements for the exercise of specific jurisdiction: relatedness, purposeful availment, and reasonableness. *See* Recommended Decision at 2 (quoting *Nowak v. Tak How Invs., Ltd.*, 94 F.2d 708, 712-13 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1333 (1997)).

cases, the jurisdictional hitch comes from the requirement of purposeful availment.

Harcros objects to the Magistrate Judge's finding of purposeful availment. In *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), Justice O'Connor, writing on behalf of a plurality of the Supreme Court, stated:

The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.

Asahi, 480 U.S. at 112. The Court of Appeals for the First Circuit adopted the plurality's position in *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671 (1st Cir. 1992), in which it indicated that personal jurisdiction would not exist over the defendant because "'mere awareness' that a product may end up in the forum state does not constitute 'purposeful availment.'"² *Boit*, 967 F.2d at 683. In rejecting the plaintiffs' stream-of-commerce theory, the court specifically stated that "[t]here is no evidence in the record that [the defendant] intended to serve the market in Maine." *Id.* To support its conclusion, the *Boit* court reiterated the *Asahi* examples of "additional conduct" and

² In adopting the plurality's position in *Boit*, the court discussed *Dalmau Rodriguez v. Hughes Aircraft Co.*, 781 F.2d 9 (1st Cir. 1986), in which it had previously addressed and rejected the stream-of-commerce theory of personal jurisdiction. *Boit*, 967 F.2d at 682. In *Dalmau Rodriguez*, the court found that the sale of two helicopters through a distributor did not give rise to personal jurisdiction over the manufacturer, even though a technician and a sales representative employed by the manufacturer had visited the forum on its behalf. *Dalmau Rodriguez*, 781 F.2d at 14-15. Harcros argues that *Dalmau Rodriguez* is controlling precedent for this case, and it asserts that its contacts are even less substantial than those of the defendant in *Dalmau Rodriguez*. The Court notes that *Dalmau Rodriguez*, while still relevant for its rejection of the stream-of-commerce theory, is not helpful in applying *Asahi*'s additional conduct analysis because *Dalmau Rodriguez* was decided prior to the Supreme Court's decision in *Asahi*.

concluded that the record did not provide evidence of those types of conduct. *Id.*

In the instant case, the Magistrate Judge found evidence of two of the examples offered by the Court of Appeals for the First Circuit as "additional conduct" indicative of the minimum contacts necessary to support a finding of personal jurisdiction. First, Harcros has established a national customer service "800" telephone number for technical advice. The Magistrate Judge determined that, through this number, Harcros "made its technical advisors available to the plaintiffs in Maine." Recommended Decision at 8. The Court concludes that the mere maintenance of an "800" telephone number is not sufficiently directed at the State of Maine to constitute additional conduct evincing "an intent or purpose to serve the market in the forum State."³ *Asahi*, 480 U.S. at 112.

Second, the Magistrate Judge found that Harcros has "used its distribution network to service the plaintiffs in Maine." Recommended Decision at 8. The record reveals that New England Resins, along with several other distributors located in the New England and mid-Atlantic regions, carried Harcros products. Deposition of Ellen Murphy ("Murphy Dep.") at 45-46; Deposition of Henry C. Reyna ("Reyna Dep.") at 14; Deposition of William Gurley ("Gurley Dep.") at 55-56. The record further indicates that Harcros was aware that its distributors' sales territories included Maine. Deposition of Mark D. Loudenslager ("Loudenslager Dep.") at 20, 67; Gurley Dep. at 37. Harcros has established a distribution

³ Plaintiffs assert that the telephone calls placed to Harcros after the discovery of the allegedly defective pigment should be construed as evidence that the 800 telephone number is directed at Maine. However, the Court of Appeals for the First Circuit has indicated that contacts made after the cause of action arises do not impact the jurisdictional analysis. See *Bond Leather Co. v. Q. T. Shoe Mfg. Co.*, 764 F.2d 928, 932 n.2 (1st Cir. 1985); *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079, 1082 n.3 (1st Cir. 1973).

network that includes distributors who target Maine as part of their sales territories.

Loudenslager Dep. at 27. The arrangement with New England Resins is the sort of conduct that "may indicate an *intent or purpose* to serve the market in the forum State." *Asahi*, 480 U.S. at 112 (emphasis added). By arranging to have a distributor, if not several of them, whose sales territory will include the forum state, a manufacturer evinces at the very least an *intent* to serve the market in the forum state. Further, the record indicates that New England Resins did, in fact, attempt to serve the market for Harcros products in Maine by contacting Plaintiffs in 1991.⁴ Gurley Dep. at 22. Harcros promotional materials and samples were sent to Plaintiffs in early 1991. Gurley Dep. at 23, 30. Although New England Resins was unsuccessful in soliciting Plaintiffs' business, *id.* at 35, the attempt is still relevant for jurisdictional purposes.⁵ It further indicates that Harcros sold its products to distributors who would at least attempt to resell the products in Maine. This demonstrates an *intent* to serve the market for pigments in Maine.

The function of the purposeful availment requirement is to ensure that a nonresident defendant is not haled into the forum based upon "'random, isolated, or fortuitous' contacts with the forum state." *Sawtelle v. Farrell*, 70 F.3d 1381, 1391 (1st Cir. 1995) (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). The Court sees nothing random, isolated, or fortuitous about a manufacturer's relationships with distributors whose sales territories include

⁴ As explained previously, the Court does not consider contacts made after the cause of action arose. Therefore, the Court does not take notice of New England Resins's attempts to solicit business from Plaintiffs in 1996. *See infra* at n.3.

⁵ Harcros argues that the 1991 solicitation is irrelevant because it involved iron oxides rather than the burnt umber pigment at issue in this case. The Court is not persuaded that this distinction bears on Harcros's intent to serve the Maine market for its products.

the forum state.⁶ Such an arrangement allows the manufacturer to assume that the forum state's market for its product will be served. When a manufacturer makes the effort to select distributors who will target Maine as part of their sales territories, the manufacturer's contacts with Maine are not random or fortuitous, but instead, the result of a conscious and deliberate decision to serve the market here.

Harcros points out that Plaintiffs did not purchase the pigments in question from any of the New England distributors who carried Harcros products but, rather, purchased the pigments from Walsh, a Missouri corporation. Murphy Dep. at 49. The Court acknowledges this

⁶ The purposefulness requirement is informed by considerations of voluntariness and foreseeability. See *Nowak*, 94 F.3d at 716. At oral argument, Harcros correctly pointed out that the voluntariness inquiry "ensures that the defendant's contacts with the forum state are not based on 'the unilateral actions of another party or a third person.'" *Scott v. Robert Trent Jones II*, ___ F. Supp. ___, 1997 WL 702935, at *5 (D. Me. 1997) (quoting *Nowak*, 94 F.3d at 716). Harcros objects to the Magistrate Judge's consideration of New England Resins's contacts with Maine as well as its contacts with Plaintiffs and encourages the Court not to attribute to it the conduct of New England Resins. *Asahi*, however, explicitly contemplates consideration of manufacturers' relationships with distributors in the jurisdictional inquiry. *Asahi*, 480 U.S. at 112. Such a relationship may indicate an intent to serve the market in the forum state, *id.*, and thus, any contact with the forum state made in the furtherance of such a relationship cannot be considered to be "unilateral" on the part of the distributor.

Harcros argues that the language of *Asahi* should be construed to require both intent to serve the market in the forum state *and* conduct in the forum state. Harcros asserts that its relationship with New England Resins does not satisfy the criteria for additional contacts set forth in *Asahi* because Harcros has not appointed a sales agent *in* Maine. The Court is not persuaded that *Asahi* requires a distributor to be located in the forum state in order to infer an intent to serve the market in the forum state. It is the relationship between Harcros and New England Resins, as well as New England Resins's corresponding role as Harcros's distributor in Maine (as part of its sales territory), that satisfies the additional contacts requirement articulated in *Asahi*. See *Asahi*, 480 U.S. at 412 (indicating that a relationship with a distributor "who has agreed to serve as the sales agent in the forum State" is the type of additional conduct necessary for a finding of purposeful availment). The Court is unwilling to draw a distinction between appointing a sales agent with offices in Maine and a sales agent whose sales territory includes Maine. With either appointment, the manufacturer is ensuring that the market for its products in Maine will be served, and such a result is foreseeable.

interesting factual twist, but it does not negate Harcros's additional conduct evincing an intent or purpose to serve Maine's market for pigments. The Court is satisfied that *Asahi's* application to these facts does not thwart the First Circuit's explicit rejection of the stream-of-commerce theory. Harcros has not merely placed its pigments into the stream of commerce. Rather, it has carefully and knowingly chosen distributors located in this region whose sales territories include Maine. In doing so, it has indicated the requisite intent or purpose to serve the market in Maine and, thus, has purposefully availed itself of this forum.

B. WALSH'S OBJECTIONS

The application of the three-prong test for specific jurisdiction to the jurisdictional facts alleged by Plaintiffs indicates that this Court properly exercises personal jurisdiction over Walsh in this matter. Walsh raises several objections to the Magistrate Judge's Recommended Decision.

First, Walsh protests the Magistrate Judge's conclusion that it has purposefully availed itself of the Maine forum. Walsh points out that it did not solicit Plaintiffs' business but merely responded to Plaintiffs' unsolicited orders. This argument, however, is substantially weakened by the course of dealing between Walsh and Plaintiffs. Walsh did not reject Plaintiffs' orders and, in fact, continued to provide Plaintiffs with Harcros products over the course of five years.

Murphy Dep. at 48-49. Walsh further asserts that Plaintiffs accepted delivery of the pigments in Missouri. However, the fact that title to the shipments passed in Missouri is not determinative. *See Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 30 (1st Cir. 1988) (rejecting such an argument as insignificant to the jurisdictional analysis). Walsh directed seventeen shipments to Plaintiffs in Maine over the course of five years. Murphy Dep. at 49. The record indicates that Walsh knew that Plaintiffs were located in Maine and communicated with

Plaintiffs by telephone and mail regarding each shipment. Murphy Dep. at 11-12. Walsh considered Plaintiffs to be customers. Murphy Dep. at 39. This course of conduct is sufficient to support a finding of purposeful availment on the part of Walsh.⁷ See *Coolidge v. Judith Gap Lumber Co.*, 808 F. Supp. 889, 892 (D. Me. 1992) (finding that "knowingly accepting an order to ship lumber here, choosing and packing a boxcar, and making such delivery to Maine by rail" constitutes purposeful availment).

Walsh also argues that the Magistrate Judge erred in concluding that the First Circuit's gestalt factors do not counsel against dismissal. The Court finds the Magistrate Judge's conclusion to be correct. The gestalt factors, used to evaluate the reasonableness of exercising personal jurisdiction over nonresident defendants, include:

(1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

Nowak, 94 F.3d at 717 (citations omitted). Walsh bears the burden of demonstrating that the gestalt factors militate against the exercise of jurisdiction. See *Coolidge*, 808 F. Supp. at 891. In objecting to the Magistrate Judge's conclusion, Walsh focuses solely upon the first gestalt factor and argues that because it is a small, foreign corporation, it would be unfair to subject it to

⁷ Walsh relies on *Banton Industries, Inc. v. Dimatic Die & Tool Co.*, 801 F.2d 1283 (11th Cir. 1986). In *Banton*, the court based its decision in part on the fact that the goods were tendered in a different state. *Banton*, 801 F.2d at 1284. As noted previously, the First Circuit does not find this factor determinative. Further, the Court declines to follow the Eleventh Circuit case law in favor of the case law established by this Court which indicates that Walsh's contacts are sufficient for purposeful availment. See *Coolidge v. Judith Gap Lumber Co.*, 808 F. Supp. 889 (D. Me. 1992).

personal jurisdiction in Maine. Defendant Walsh's Objection to the Magistrate Judge's Recommended Decision at 6-7. The Court notes that a defendant must allege something "beyond the ordinary cost and inconvenience of defending an action so far from its place of business." *Nowak*, 94 F.3d at 718. Walsh's size and the corresponding burden of foreign litigation does not outweigh the sum of Maine's interest in resolving the dispute and Plaintiffs' interest in obtaining convenient and effective relief. Maine has an interest in adjudicating this dispute, as the injury occurred in this forum. *See Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 211 (1st Cir. 1994). Plaintiffs' interest weighs in favor of a Maine forum, as Plaintiffs are Maine corporations of similar size to Walsh. Affidavit of Irving Quimby (Docket No. 24) ¶ 9 (Plaintiffs have two offices and 80-120 employees); Murphy Dep. at 42 (Walsh has seven offices and 52 employees). Further, two of the shoe companies to whom Plaintiffs sold the allegedly defective shoe soles are Maine companies, thus indicating that a number of potential witnesses are located in Maine. Affidavit of Robert L. Morin (Docket No. 22) ¶ 10. The Court concurs with the Magistrate Judge in concluding that Walsh has not demonstrated that the gestalt factors compel dismissal.

CONCLUSION

The Court accepts Magistrate Judge Cohen's decisions on Defendants' Motions to Dismiss. Accordingly, it is **ORDERED** that Defendant Harcros's Motion to Dismiss be, and it is hereby, **DENIED**. Further, it is **ORDERED** that Defendant Walsh's Motion to Dismiss be, and it is hereby, **DENIED**.

GENE CARTER
District Judge

Dated at Portland, Maine this 5th day of February, 1998.